MOTION FILED

FEB 2 8 2003

(3)

No. 02-1112

In the Supreme Court of the United States

EDWARD D. JONES & CO., L.P., D/B/A EDWARD JONES, AND PAUL HUSTED,

Petitioners,

v.

ALICE P. KLOSS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN DUNHAM BRYANT
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

EVAN M. TAGER
MIRIAM R. NEMETZ
Counsel of Record
STEPHANIE MARTZ
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for *Amicus Curiae*

23pp

MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the petitioners. The petitioners have consented to the filing of the brief, and their written consent has been filed with the Clerk; the respondent, however, has refused to consent to the filing of the Chamber's brief.

The Chamber of Commerce of the United States (the Chamber) is the world's largest business federation representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

Many of the Chamber's members have found that arbitration allows them to resolve disputes promptly and efficiently, while avoiding the costs associated with traditional litigation. Accordingly, many of these interstate businesses routinely include arbitration provisions in their contracts. Because some Chamber members can be sued in virtually any state, they rely on the protection afforded by the Federal Arbitration Act ("FAA") to ensure that their arbitration agreements are enforced in spite of the vagaries and preferences of the judiciaries of individual states.

The Chamber's members have observed that the courts of some states have become increasingly willing to strike down arbitration clauses based on rules that ostensibly derive from the common law but are fashioned specifically to address arbitration agreements. The decision below exemplifies this trend: the Supreme Court of Montana refused to enforce a clear and prominently displayed arbitration clause, which indisputably had been signed by the plaintiff, on the ground that the defendants had not pointed out the provision and explained its significance and effect. The court purported to render its decision under common law rules applicable to all contracts, but in fact it invented from whole cloth a special notice requirement for arbitration clauses. If federal law permits courts freely to impose such newly-minted requirements on arbitration, then the ability of businesses to contract for alternative dispute resolution procedures will become illusory. Accordingly, the Chamber has a strong interest in encouraging this Court to review, and reverse, the decision below.

For the foregoing reasons, the motion of the Chamber of Commerce of the United States to file the accompanying brief as *amicus curiae* in support of Petitioners should be granted.

Respectfully submitted.

STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN DUNHAM BRYANT
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

EVAN M. TAGER
MIRIAM R. NEMETZ
Counsel of Record
STEPHANIE MARTZ
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

A. The Montana Supreme Court's Decision Reflects That Court's Hostility To Arbitration Agreements 3

B. The Montana Supreme Court's Decision Is Inconsistent With This Court's Decisions Construing Section 2 Of The Faa 6

C. The Decision Below Is Part Of A Growing Trend To Invalidate Arbitration Agreements On State Common Law Grounds That Apply Only To Such Provisions 11

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

ACORN v. *Household Int'l, Inc.*, 211 F. Supp. 2d 1160 (N.D. Cal. 2002) 13, 14

Allied-Bruce Terminix Cos. v. *Dobson*, 513 U.S. 265 (1995) 6, 7, 9

Armendariz v. *Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000) 15

Badie v. *Bank of America*, 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998) 13, 15

Dillard v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148 (5th Cir. 1992) 8

Doctor's Associates Inc. v. *Casarotto*, 517 U.S. 681 (1996) 8, 9, 11

EZ Pawn Corp. v. *Mancias*, 934 S.W.2d 87 (Tex. 1996) 14

Green Tree Fin. Corp. v. *Vinston*, 753 So. 2d 497 (Ala. 1999) 14

Hill v. *Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) 13

Iwen v. *U.S. West Direct*, 977 P.2d 989 (Mont. 1999) 12

Long v. *Fidelity Water Sys., Inc.*, 2000 WL 989914 (N.D. Cal. May 26, 2000) 13

Luna v. *Household Fin. Corp. III*, 236 F. Supp. 2d 1166 (W.D. Wash. 2002) 12, 14

Mandel v. *Household Bank*, 129 Cal. Rptr. 380 (Cal. Ct. App. 2003) 14

TABLE OF AUTHORITIES

Page(s)

Mattingly v. *Hughes Elec. Corp.*, 2002 WL 31444472 (Md. Ct. Spec. App. Nov. 4, 2002) 13

Ex Parte McNaughton, 728 So. 2d 592 (Ala. 1998) 13

Mendez v. *Palm Harbor Homes, Inc.*, 45 P.3d 594 (Wash. App. 2002) 11

Mercuro v. *Superior Court*, 116 Cal. Rptr. 2d 671 (Cal. Ct. App. 2002) 12

Passage v. *Prudential-Bache Securities, Inc.*, 727 P.2d 1298 (Mont. 1986) 3

Perry v. *Thomas*, 482 U.S. 483 (1987) 2, 6, 7

Powertel, Inc. v. *Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999) 13, 14

Scherk v. *Alberto-Culver Co.*, 417 U.S. 506 (1974) 6

Southland Corp. v. *Keating*, 465 U.S.1 (1994) 6

State of West Virginia ex rel. Dunlap v. *Berger*, 567 S.E.2d 265 (W. Va. 2002) 14

Szetela v. *Discover Bank*, 118 Cal. Rptr. 2d 862 (Cal Ct. App. 2002), cert. denied, __ S. Ct. __ (2003) 12, 15

Ex Parte Thicklin, 824 So. 2d 723 (Ala. 2002) 14

Three Valleys Mun. Water Dist. v. *E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991) 15

Ting v. *AT&T*, 2003 WL 292296 (9th Cir. Feb. 11, 2003) 14

TABLE OF AUTHORITIES

Page(s)

Statutes

9 U.S.C. § 2 ..... *passim*

ART. II, § 16 MONT. CONST. 4

ART. II, § 26 MONT. CONST. 4

Mont. Code Ann. § 27-5-114(4) (1995) 7

Miscellaneous

2 I. MacNeil, R. Speidel, T. Stipanowich and G. Shell, FEDERAL ARBITRATION LAW (1995) 8, 13

Jean S. Sternlight, *The Basic Structure of the FAA: Possible Challenges to Arbitration Agreements*, 2 ANN. 2000 ATLA CLE 2211 (2000) 11-12

David G. Wirtes, *Suggestions for Defeating Arbitration*, 24 AM. J. TRIAL ADVOC. 111 (Summer 2000) 10

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the preceding motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Montana Supreme Court has held that an otherwise valid arbitration provision, signed by the respondent after she had an opportunity to review the contract, is unenforceable because the petitioners did not orally highlight and explain the arbitration provision. Although the court said that it was applying the state common law rules that govern all contracts of adhesion, nothing about the opinion suggests that the court would apply this "oral notice" requirement to any other sort of contract term. Indeed, in holding that the arbitration clause was not within the respondent's reasonable expectations, the court was moved principally by the key feature of all such provisions – *i.e.*, that by agreeing to arbitrate respondent waived her right to a jury trial and to access to the courts. The concurring opinion filed by Justice Nelson, which was joined by all of the other justices in the majority, makes especially clear that the court was moved by its view that heightened notice standards should apply to arbitration agreements because they necessarily involve the waiver of constitutional rights.

---

[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

Section 2 of the Federal Arbitration Act ("FAA") provides that "a written provision in * * * a contract * * * to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has made clear, the role of state law in determining the enforceability of an arbitration clause, while significant, is carefully circumscribed by the FAA. Although an arbitration provision may be invalidated under state law for reasons that would apply equally to the other terms of the contract, "the uniqueness of an agreement to arbitrate" may not be raised as grounds for its invalidation under state law. *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). The Montana Supreme Court's decision plainly runs afoul of this limitation; indeed, this Court has already held that the Montana legislature could not impose by statute special notice requirements for arbitration of the sort that the court below has mandated.

This case is a particularly clear example of a burgeoning trend among certain courts to invalidate arbitration agreements based on state-law rules that are described under the rubric of general contract law, but in fact have been fashioned solely to deal with arbitration agreements. These decisions threaten to make the validity of arbitration agreements entirely a matter of the various courts' ad hoc articulations of state law, diluting the strong federal policy favoring the private ordering of dispute resolution. This case provides the Court with a perfect vehicle to begin to explain the appropriate role of state common law in determining the validity of contractual arbitration clauses.

ARGUMENT

A. The Montana Supreme Court's Decision Reflects That Court's Hostility To Arbitration Agreements

The Montana Supreme Court's decision is a classic example of judicial hostility to arbitration, expressed through the discriminatory application of state common law. The court purported to apply the state-law principles that govern *all* contracts. In fact, however, its refusal to order Kloss to abide by the arbitration agreement that she signed reflected the court's distaste for arbitration – in particular, the fact that by agreeing to arbitrate individuals give up their rights to the judicial resolution of their claims.

In invalidating the arbitration provision in Kloss's contract with Edward Jones, the Montana Supreme Court purported to apply "generally applicable contract law defenses" (Pet. App. 16) – in particular, those concerning contracts of adhesion. According to the court:

> Contracts of adhesion arise when a standardized form of agreement, usually drafted by the party having superior bargaining power, is presented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms. * * * [S]uch a contract * * * will not be enforced against the weaker party when it is (1) not within the reasonable expectations of said party or (2) within the reasonable expectations of the party, but, when considered in its context, is unduly oppressive, unconscionable, or against public policy.

Id. at 12 (quoting *Passage* v. *Prudential-Bache Securities, Inc.*, 727 P.2d 1298, 1302 (Mont. 1986)).

Finding that the contract between Edward Jones and Kloss was one of adhesion (Pet. App. 13), the court invali-

dated the arbitration provision because it determined that the provision was "clearly not within Kloss's reasonable expectations." *Id.* at 14. The court's basis for that finding was merely that Kloss's broker "did not explain the arbitration provision (a provision by which Kloss waived at least two constitutional rights, *i.e.*, a right of access to the courts pursuant to Article II, Section 16, and her right to a jury trial pursuant to Article II, Section 26 of the Montana Constitution) to Kloss." *Ibid.*

In finding that the agreement was not within Kloss's reasonable expectations, the court did not consider *any* of the factors one might expect to be part of that analysis – for example, whether Kloss was generally familiar with arbitration provisions; whether she had prior experience in dealing with brokerage contracts; whether she was aware that some such contracts contain arbitration clauses; whether such provisions are ubiquitous in the industry; or whether an individual in Kloss's position would be surprised by having to submit to an arbitrator the type of dispute at issue. Instead, the court appeared to be moved solely by its view that "Kloss waived her right of access to this State's courts, her right to a jury trial, her right to reasonable discovery, her right to findings of fact based on the evidence, and her right to enforce the law applicable to her case by way of appeal." *Ibid.* Thus, the decision turned *solely* on the fact that arbitration, by its very nature, proceeds outside the court system. Indeed, the decision can be read to adopt a rule that *no* arbitration provision can be enforced against an individual who chooses not to read a standard form contract, unless the offerer specifically points out and explains the provision before the contract is signed.

The discomfort with arbitration that underlies the court's decision was more fully laid bare in Judge Nelson's concurrence, which was joined by every one of the Justices in the majority. Judge Nelson wrote his concurrence to "further

develop" what he called the "additional rationale supporting our decision in this case – *i.e.*, *whether Kloss effectively waived her rights to a trial by jury and to access to the courts* * * *." *Id.* at 22 (emphasis added).[2]

Justice Nelson posited that the "constitutionally guaranteed right of a jury trial is 'fundamental' and, therefore, deserving of the highest level of court scrutiny and protection." *Id.* at 25. "Given the sacredness and inviolability of the fundamental right to trial by jury," he concluded, "any contract provision that openly or subtly causes the forfeiture of the exercise of this right must be rigorously examined by the courts." *Id.* at 26. He found, further, that "the right of access to the courts must be protected as the fundamental constitutional right it is." *Id.* at 28-29.

Justice Nelson made no secret of his disapproval of the arbitration agreements that interfere with these "fundamental rights." In his view, the inclusion of an arbitration clause in a standard form contract "is at one and the same time an 'open attack' on the right of jury trial and a 'secret machination' causing forfeiture of the right that Blackstone predicted would 'sap and undermine' the right, and with that our 'public and private libert[ies].'" *Id.* at 26 Indeed, he professed dramatically that "large national and multi-national corporations are effectively privatizing an important segment of the civil justice system in this country by including fine-print,

---

[2] Justice Nelson added that "other constitutional rights may be implicated in these sorts of cases, including the right to due process of law * * * and equal protection. Moreover, as our Opinion points out, arbitration results in loss of certain procedural rights such as the right to engage in discovery and the right to have the admissibility of evidence judged under the Montana Rules of Evidence. Additionally, the right to judicial review of arbitration decisions is severely restricted – *i.e.* effectively there is no right of appeal from these decisions." Pet. App. 22 n.1

non-negotiable, take-it-or-leave-it, mandatory, binding arbitration clauses in their standard-form contracts." *Id.* at 29.

Justice Nelson continued that, "where fundamental constitutional rights are involved * * * the law is eminently clear that the waiver of such rights will not be lightly presumed." *Id.* at 31. Thus, despite the undisputed findings that the arbitration clause appeared on the second page of the contract in boldface type and was referenced again in a boldface notice immediately above the signature line, that Kloss had the opportunity to read the contract before she signed it, and that she would have understood the arbitration provision had she read it (*id.* at 46), Judge Nelson found that "there is no evidence to support a conclusion that Kloss knowingly and intelligently waived her rights to trial by jury and access to the courts." *Id.* at 32. On this ground, he and the other justices in the majority (all of whom joined his concurring opinion) found that the arbitration clause was unenforceable.

B. The Montana Supreme Court's Decision Is Inconsistent With This Court's Decisions Construing Section 2 Of The FAA

In enacting the FAA, Congress "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1994). The Act's "basic purpose" is "to put arbitration provisions on 'the same footing' as a contract's other terms." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995) (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Accordingly, Section 2 of the FAA "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Perry*, 482 U.S. at 489 (quoting 9 U.S.C. § 2). Unless that savings clause

applies, "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law.*" *Id.* at 492 n.9 (1987) (emphasis in original).

Section 2 of the FAA carves out a limited role for the states in the regulation of contractual arbitration. An agreement to arbitrate may be invalidated on state law grounds "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry*, 482 U.S. at 493 n.9 (emphasis in original). Accordingly, Section 2 gives the States, for example, "a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision." *Allied-Bruce*, 513 U.S. at 281. However, "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2." *Perry*, 482 U.S. at 493 n.9. "Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what * * * the state legislature cannot." *Ibid.*

In sum, as this Court has ruled:

> What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress' intent.

Allied-Bruce, 513 U.S. at 281.

The Court recently applied these principles to invalidate a Montana statute requiring that "[n]otice that [the] contract is subject to arbitration" be "typed in underlined capital letters

on the first page of the contract." *Doctor's Associates Inc.* v. *Casarotto*, 517 U.S. 681, 683 (1996) (quoting Mont. Code Ann. § 27-5-114(4) (1995)). The Court reiterated that, in the FAA, "Congress precluded States from singling out arbitration provisions for suspect status." *Id.* at 682. Montana's first-page notice requirement was impermissible under Section 2 because the requirement "governs not 'any contract,' but specifically and solely contracts 'subject to arbitration.'" *Ibid.* Put another way, "state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is pre-empted" by the FAA. *Id.* at 687 (quoting 2 I. MacNeil, R. Speidel, T. Stipanowich and G. Shell, FEDERAL ARBITRATION LAW § 19.1.1, at 19:4-19:5 (1995)).

In the decision below, the Montana Supreme Court has used the cloak of the common law to do precisely what this Court ruled that the Montana legislature may not do by statute: it has "condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Casarotto*, 517 U.S. at 687. Notably, the court did not rule that *all* significant contract provisions must be explained to a person in Kloss's position. The court's decision to invalidate the provision instead "singl[ed] out arbitration provisions for suspect status" (*id.* at 682), turning on the fact that, in agreeing to arbitrate, Kloss "waived at least two constitutional rights" under State law. Pet. App. 14.[3] The concurrence of Justice Nelson – a diatribe

---

[3] As many federal courts have held, the fact that an arbitration agreement constitutes a waiver of the Seventh Amendment right to a jury trial does not provide a basis upon which to invalidate the agreement. See, *e.g.*, *Dillard* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992) ("the Seventh Amendment does not preclude 'waiver' of the right to jury trial through the signing of a valid arbitration agreement").

against the use of arbitration clauses in standard form contracts that was joined by *all* of the justices in the majority – makes it even more clear that the decision was motivated by hostility to arbitration, not by general common law principles that govern the enforceability of all contracts.[4]

It is no answer to say that the court would have applied its rule even-handedly to *any* contract provision effecting a waiver of fundamental rights. The FAA permits the states to invalidate arbitration provisions *only* by employing principles that apply to "contracts *generally*." *Casarotto*, 517 U.S. at 688 (emphasis added). Thus, Montana's discriminatory requirement is not immunized from pre-emption simply because it can be framed in terms that theoretically might encompass some contract provision other than an arbitration clause. Because the decision below undoubtedly "places arbitration agreements in a class apart from 'any contract,' and singularly limits their validity," the rule approved by the Montana Supreme Court is "inconsonant with, and is therefore pre-empted by, the federal law." *Id.* at 688.

The Montana Supreme Court's error is a grave one that threatens to substantially undermine the FAA's policy favoring arbitration. First, the decision will cast into doubt the enforceability of the arbitration clauses in an untold number of existing contracts in Montana. The many trial attorneys who dislike arbitration clauses will seize upon the decision

---

[4] This Court's decisions do not suggest that standard form agreements signed by consumers are any less entitled to protection under Section 2 than are individually negotiated agreements. See, *e.g.*, *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995) (upholding arbitration clause in contract between termite control company and homeowner). Indeed, the Court observed in *Allied-Bruce* that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Id.* at 280.

below – which could be used to contest the enforceability of any arbitration clause, no matter how prominently disclosed, in virtually any standard-form contract – as a ground for avoiding arbitration.[5] Even in the event that some of the many existing arbitration agreements were explained orally to those signing them, companies are unlikely to have retained records of those discussions. With the Montana Supreme Court having articulated no obvious limits on its holding, *all* arbitration provisions governed by Montana law that were *not* the subject of specific negotiations by the parties will be up for grabs.[6]

Second, companies trying to enter into enforceable arbitration provisions in the future will be forced to assume substantial new burdens. To satisfy the Montana Supreme Court's requirements, they will have to adopt procedures to orally disclose and explain to each person who signs an arbitration agreement the effect and significance of the provision. They will have to be careful what they say: the oral statements of the party proposing an arbitration clause have been

---

[5] Indeed, trial attorneys are keenly aware that state contract law provides fertile ground for avoiding enforcement of arbitration agreements. See, *e.g.*, David G. Wirtes, *Suggestions for Defeating Arbitration*, 24 AM. J. TRIAL ADVOC. 111, 138 (Summer 2000) (describing the "factors [counsel should] look for when attempting to establish that [an arbitration] agreement would be unconscionable if enforced against your client").

[6] Much was made below of the fact that the respondent is "a 95-year old widow." Pet. App. 18. But there was no finding that Mrs. Kloss lacked mental acuity, was financially vulnerable, or was particularly unsophisticated. Nor was it shown that arbitrating her claim (which surely would have been more expeditious) rather than litigating it would have been particularly disadvantageous to her. Certainly, the court's decision did not turn on any such specific facts.

cited as grounds for *invalidating* the agreement. See *Mendez* v. *Palm Harbor Homes, Inc.*, 45 P.3d 594, 602 (Wash. App. 2002) (fact that sales representative told the plaintiff that "arbitration would be cheaper and more convenient" contributed to the finding that an arbitration agreement was unconscionable). Moreover, they will have to employ significantly more onerous and expensive record-keeping practices: with a signed arbitration agreement now insufficient in Montana to demonstrate the parties' agreement to arbitrate, a company seeking to enforce its arbitration agreements also will have to keep detailed and verifiable records of the oral conversations that accompany the signing of these contracts.

This Court having ruled in *Casarotto* that the Montana legislature could not require that "[n]otice that the contract is subject to arbitration" be "typed in underlined capital letters on the first page of the contract" (517 U.S. at 683), it is inconceivable that the Montana courts, purporting to apply their common law, may impose far more extensive notice requirements. Review by this Court clearly is warranted to ensure that a new strand of the common law, developed solely to give expression to some courts' continued suspicion of arbitration, does not interfere with the FAA's principles.

C. The Decision Below Is Part Of A Growing Trend To Invalidate Arbitration Agreements On State Common Law Grounds That Apply Only to Such Provisions

The Montana Supreme Court is not alone in refusing to enforce an arbitration clause by applying a common law principle fashioned particularly to express the court's discomfort with arbitration. As a presenter at the annual meeting of a prominent association of trial lawyers recently noted, "courts seem to be increasingly willing to refuse to enforce arbitration agreements on standard contractual grounds." Jean S. Sternlight, *The Basic Structure of the FAA: Possible*

Challenges to Arbitration Agreements, 2 ANN. 2000 ATLA CLE 2211 (2000). These courts, purporting to apply only "such grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. § 2), are fashioning a new body of law imposing a host of procedural and substantive requirements on arbitration. Although the cases often are decided under principles having familiar names – most often they purport to apply the doctrine of unconscionability – the decisions depend on considerations that are peculiar to arbitration agreements and reflect the judges' views that arbitration disfavors the "weaker" party.

For example, many arbitration agreements have been held to be unconscionable because they fail some *ad hoc* test of mutuality. See, *e.g.*, *Iwen* v. *U.S. West Direct*, 977 P.2d 989 (Mont. 1999) (arbitration clause between yellow pages publisher and purchaser of advertisement was unconscionable because it allowed the publisher to sue in court to collect payments under the contract). In some cases, courts have found arbitration agreements to be unconscionable on the ground that they suffer from non-mutuality even when the agreements are facially neutral. See *Mercuro* v. *Superior Court*, 116 Cal. Rptr. 2d 671, 679 (Cal. Ct. App. 2002) (neutral provision specifying arbitration forum contributed to finding of unconscionability because the "repeat player effect" rendered the provision disadvantageous to the "weaker party"); *Szetela* v. *Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal Ct. App. 2002), cert. denied, __ S. Ct. __ (2003) (mutual prohibition on class actions was "manifest[ly] one-sided[]" and therefore substantively unconscionable "because card companies typically do not sue their customers in class action lawsuits"); *Luna* v. *Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1180 (W.D. Wash. 2002) (holding that facially neutral confidentiality provision in arbitration agreement unfairly disadvantaged consumers and accordingly was unconscionable, after noting "[t]he advantages repeat participants pos-

sess over 'one time' participants in arbitration proceedings"); *ACORN* v. *Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002) (same). But other courts have recognized that the "application of any state law principle establishing a mutuality requirement for arbitration clauses stricter than that governing other contract clauses would violate the FAA." 2 I. MacNeil, *et al.*, *supra*, § 17.4.2; see, *e.g.*, *Ex Parte McNaughton*, 728 So. 2d 592, 598 (Ala. 1998) (holding that it was improper to apply the non-mutuality doctrine to an arbitration clause where it rested on the concern that the agreement causes one party to "waiv[e] his right to a remedy by due process of law * * * and his right to trial by jury").

Other courts, like the Montana Supreme Court in the decision below, have refused to recognize in the case of arbitration clauses the forms of offer and acceptance that they have found sufficient to make enforceable the other terms and conditions of consumer contracts. See, *e.g.*, *Long* v. *Fidelity Water Sys., Inc.*, 2000 WL 989914, *3 (N.D. Cal. May 26, 2000); *Badie* v. *Bank of America*, 79 Cal. Rptr. 2d 273, 277-278 (Cal. Ct. App. 1998); *Powertel, Inc.* v. *Bexley*, 743 So. 2d 570, 575 (Fla. Dist. Ct. App. 1999); *Mattingly* v. *Hughes Elec. Corp.*, 2002 WL 31444472, *7-*8 (Md. Ct. Spec. App. Nov. 4, 2002). In *Powertel*, for example, the Florida court held that an arbitration clause in a customer's contract with a cellular telephone service provider was unenforceable because, among other things, "Powertel should have given a more prominent notice of such an important change." 743 So. 2d at 575. The courts imposing such special notice requirements often insist that they are necessary because the customer must be alerted that "he or she is waiving an important constitutional right." *Badie*, 79 Cal. Rptr. 2d at 805. In contrast, other courts applying this Court's decisions have deemed Section 2 of the FAA to be "inconsistent with any requirement that an arbitration clause be prominent." *Hill* v. *Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997)

(enforcing arbitration clause after noting that the "[t]erms inside Gateway's box stand or fall together"); see also *Green Tree Fin. Corp.* v. *Vinston*, 753 So. 2d 497, 502 (Ala. 1999) (burden is on customer to read what he or she signs; defendant had no duty "to disclose, or explain, the arbitration clause to the Vinstons"); *EZ Pawn Corp.* v. *Mancias*, 934 S.W.2d 87, 90 (Tex. 1996) ("We presume a party * * * who has the opportunity to read an arbitration agreement and signs it, knows its contents.").

Under the rubric of unconscionability, moreover, some courts have refused to enforce arbitration clauses in which the parties agree to waive punitive damages. See, *e.g.*, *State of West Virginia ex rel. Dunlap* v. *Berger*, 567 S.E.2d 265, 279-280 (W. Va. 2002); *Ex Parte Thicklin*, 824 So. 2d 723, 733 (Ala. 2002). Other courts have concluded that arbitration agreements that do not permit the arbitrator to entertain class actions are unconscionable, and thus unenforceable. See, *e.g.*, *Ting* v. *AT&T*, 2003 WL 292296, at *20 (9th Cir. Feb. 11, 2003); *ACORN*, 211 F. Supp. 2d at 1172; *Mandel* v. *Household Bank*, 29 Cal. Rptr. 380, 386 (Cal. Ct. App. 2003) (applying Nevada law); *Powertel*, 743 So. 2d at 576; *Luna*, 236 F. Supp. 2d at 1182-1183; *Dunlap*, 567 S.E.2d at 279-280.[7]

Courts applying California law have been particularly aggressive in imposing both substantive and procedural limitations on arbitration clauses. See *Ting*, 2003 WL 292296, at *20-*21 (holding that three aspects of the arbitration agreement between AT&T and its customers were unconscionable under California law). The California courts justify the im-

---

[7] The Chamber recently filed an amicus brief in support of the petitioner in *Green Tree Financial Corp.* v. *Bazzle*, No. 02-634, arguing that arbitration agreements that do not permit the arbitrator to award punitive damages should not be considered unconscionable.

position of these arbitration-specific rules on the theory that "the ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." *Armendariz* v. *Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 693 (Cal. 2000). Yet these decisions appear to be premised, not on the principles of contract law that are applicable to all contracts, but on the courts' view that arbitration is an inferior forum for the vindication of a party's rights.

In *Armendariz*, for example, the court invalidated an arbitration agreement for lack of mutuality after observing that the "perceived advantages of the judicial forum for plaintiffs include the availability of discovery and the fact that courts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to 'split the difference' between the two sides, thereby lowering damages awards for plaintiffs." *Ibid.* Such general suspicion of arbitration permeates the decisions of courts applying California law – including the Ninth Circuit. See, *e.g.*, *Three Valleys Mun. Water Dist.* v. *E.F. Hutton & Co.*, 925 F.2d 1136, 1141 (9th Cir. 1991) ("Before a party to a lawsuit can be ordered to arbitrate and thus *be deprived of a day in court*, there should be an express, unequivocal agreement to that effect.") (emphasis added); *Szetela*, 118 Cal. Rptr. 2d at 868 (agreement requiring individual arbitration of claims "*prohibit[s] any effective means of litigating Discover's business practices*" and grants Discover a "'get out of jail free' card while compromising important consumer rights") (emphasis added); *Badie*, 79 Cal. Rptr. 2d at 801 ("by agreeing to a unilateral change of terms provision," customers could not have "intended to give the Bank the power in the future to *terminate [their] existing right to have disputes resolved in the civil justice system, including their constitutionally based right to a jury trial*") (emphasis added). It is exceedingly hard to credit the view that these courts are applying "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

* * *

We by no means deny that state contract law has a role to play in determining whether an arbitration agreement is enforceable – just as state law determines whether the parties are bound by contract terms regarding price, warranties, conditions of sale, and similar matters. However, Congress plainly did not intend to authorize courts to employ ad hoc interpretations of state law for purposes of frustrating agreements to arbitrate. Guidance from this Court with respect to the appropriate role of state common law in determining the enforceability of arbitration agreements is acutely needed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN DUNHAM BRYANT
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

EVAN M. TAGER
MIRIAM R. NEMETZ
Counsel of Record
STEPHANIE MARTZ
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for *Amicus Curiae*

FEBRUARY 2003